United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1030

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1030

UNITED STATES OF AMERICA,

Appellee,

—against—

SIMON BRACH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1030

UNITED STATES OF AMERICA,

Appellee,

—against—

SIMON BRACH,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Simon Brach appeals from a judgment entered on December 19, 1975, in the United States District Court for the Eastern District of New York (Bartels, *J.*), convicting him, following a jury trial, of a one count indictment, charging the theft, on March 5, 1975, of a quantity of car stereo units, having a value of about $50,000, which goods were traveling in foreign commerce from Yokohama, Japan to Brooklyn, New York, such theft constituting a violation of Title 18, United States Code, Section 659.

On appeal, appellant raises many issues. The principal issue is whether the goods that he stole had lost their character as a foreign shipment at the time of the theft. In addition, appellant contends that the court improperly charged the jury on the foreign commerce element and that the court improperly circumscribed

counsel's summation on this element. Appellant also claims that the court erred in denying his motion to suppress his post-arrest admissions and in omitting to charge that the jury could disregard the statements if they found they were involuntarily made. Appellant further claims that the court erroneously refused to exclude prejudicial and irrelevant testimony concerning (1) the agents' obtaining of arrest warrants for individuals to whom appellant sold the goods; and (2) the efforts of the agents to find appellant at racetracks and betting parlors after they obtained a warrant for his arrest. Error is further claimed in the refusal of the court to allow appellant's wife to testify and by the Government's impeachment of appellant on his two prior felony convictions. It is also claimed that the Government failed to establish a *prima facie* case on the stolen nature of the goods. Finally, appellant argues that the court erroneously refused to delay the trial until after the court decided a pending § 2255 petition to set aside his earlier conviction for possession and sale of stolen goods.

Statement of Facts

A. The Government's Case

The Fried Trading Company, located at 167 Clymer Street in Brooklyn, New York is a wholesaler which imports electronic equipment from overseas. The company is operated by appellant's mother, stepfather and brothers. At one time appellant was employed by the company but was fired prior to the instant theft as a result of a feud with his brothers and father in 1974 (A. 197, A. 202, A. 203).[1]

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[1] Page references in parenthesis refer to pages in the trial transcript not reproduced in Appellant's Appendix. References preceded by "A" refer to pages in Appellant's Appendix; References preceded by "GA" refer to pages in the Government's Appendix.

In the morning of March 5, 1975 Israel Follman, a truck driver for the Fried Trading Company, drove a Fried truck to Pier 12 in Brooklyn to pick up a shipment of $50,000 worth of car stereo units that had just arrived from Yokohama, Japan.[2] After presenting the proper documents, the goods were loaded onto the truck.[3] Follman then drove the truck to the Fried Trading Company (A. 29).

Follman did not drive the truck into the premises of the Fried Trading Company but parked it in front of another building on Clymer Street, approximately fifty feet from its destination. It was not unusual for Follman to leave the truck parked on the public street for short periods of time prior to unloading (A. 48). Follman then removed two cartons from the total shipment of 166 cartons to enable the technicians to determine whether the merchandise was defective (A. 32). Defective merchandise could be returned immediately. After Follman removed the two cartons, he locked the truck and walked to the office to report to one of his employers, Nachman Brach, that the merchandise had arrived (A. 31).[4] When Follman walked into the office Nachman Brach instructed Follman to back the truck into the loading platform. The fact that a truck was directed to be backed into the loading platform did not necessarily mean that the truck was to be unloaded (A. 52). As Follman explained: "I was waiting for instructions. He (his employer) might tell me to take the truck, deliver some place else. He might. I never know what he's going to do with it"

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[2] Fried Trading Company uses independent carriers as well as its own trucks in transporting merchandise (A. 38).

[3] The Customs Public Store Appraiser retained one carton of the stereos.

[4] The truck was apparently not sealed since a common carrier was not hired.

(A. 52). Follman gave the two cartons to the technicians at the loading platform (A. 32).[5]

When Follman returned to the street the truck was missing. Follman had been gone only ten minutes.

Joseph Neuman, a local grocer and long-time acquaintance of appellant testified that at approximately 10:00 A.M., shortly after Follman noticed that the Fried truck was missing, he observed appellant driving the truck backwards down a one-way street (A. 62-A. 63). He testified that he reported the occurrence to Nachman Brach, whereupon the latter summoned the police. After the police arrived, Follman and several police officers searched in a squad car for the stolen truck (A. 35).

Joseph Karritue and MacHarthur Harvey, two employees at the Kent Knitting Mills, 963 Kent Avenue, Brooklyn, testified that between 11:00 a.m. and 12 noon on March 5 they observed appellant together with three other individuals (later identified by appellant in his post-arrest statement as co-defendant Itshak Bikel, Louis Mancini and Angelo Rosario) transferring cartons from a large truck into two vans in a hurried and furtive manner (A. 68-A. 78, A. 80-A. 87).

Gerald O'Neill, Special Agent with the Customs Service, testified that after searching for appellant for several weeks, he arrested him on April 21, 1975. After being read his *Miranda* warnings several times, appellant stated at the offices of the Customs Service that "the load is in tact" and that he would like to speak with the United States Attorney (A. 96). The agents then immediately

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[5] The testimony was unclear as to whether the two cartons were given to the technicians before or after Follman reported to Nachman Brach that the merchandise had arrived.

brought appellant to the United States Attorney's Office in the Eastern District.

As soon as he arrived the Assistant United States Attorney read appellant his *Miranda* rights again. Appellant then stated that he would explain his involvement in the events of March 5. Before he began, however, appellant asked "What's in it for me?" (A. 98). The Assistant informed appellant that no promises would be made to him other than that the cooperation he gave to the Government would be made known to the sentencing judge (A. 99).[6] Appellant then related the following:

On the morning of March 5, 1975 he was driving in his automobile on the Brooklyn-Queens Expressway with his friend Itshak Bikel. He and Bikel observed a Fried Trading Company truck on the Expressway directly in front of them. Appellant told Bikel that he wanted to steal the truck. Appellant and Bikel followed the truck until it reached the Fried Trading Company (A. 100). Appellant observed the driver enter the Fried office. Appellant then opened the locked truck with the use of a key he had retained from his former employment with the company, put the truck in reverse and drove backwards down a one-way street to Division Street. After reaching Division Street he turned the truck around and drove towards the Brooklyn-Queens Expressway (A. 101).

Appellant drove the truck to the Kent Knitting Mills. Bikel followed him in appellant's car. When the two reached the Kent Knitting Mills, Brach instructed Bikel to hire a U-Haul van to unload the merchandise and bring it to the "drop point" (A. 101).

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[6] The question of whether appellant had been granted immunity at this time was the subject of a pre-trial hearing. Judge Bartels found that no promises of immunity had been made to appellant (GA 103-104). See Point Three.

Appellant then telephoned one Louis Mancini and asked him if he was "willing to negotiate a price on the load." Mancini indicated that he was, whereupon appellant gave Mancini directions to 963 Kent Avenue. Mancini arrived there an hour later with a green van and another individual, later identified as Angelo Rosario. Bikel arrived shortly thereafter with the U-Haul van (A. 104). The four then transferred the goods into the green van and the U-Haul van. After the unloading had been completed, Rosario drove off in the U-Haul van and Mancini in the green van. Appellant stated that he received $20,000 for the entire load (A. 104), but that he only received partial payment from Mancini at the drop point (A. 104).

On April 15, 1975 appellant drove to Mancini's house in Carteret, New Jersey to receive the remainder of the payment. When appellant arrived he was told by one Al Greco that Mancini was in Florida but that he, Greco, would attempt to get the rest of the money. Greco then instructed appellant to follow him in his automobile to the residence of another individual, later identified as John Papernik. At Papernik's house, Papernik gave Greco $500 who, in turn, immediately gave the money to appellant. Appellant observed a red truck at Papernik's house which he concluded, on the basis of conversations he overheard, contained the stolen stereo units (A. 108).[7]

After appellant made the foregoing statements he agreed to assist the Customs agents in locating the truck containing the stolen goods. Since appellant knew the location only by sight he drove around New Jersey with the agents searching for the goods. Prior to his leaving

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[7] Bikel's case was severed from that of appellant because of *Bruton* problems that the post-arrest statement created.

the United States Attorney's Office, he signed a document which waived his right to a speedy arraignment and which contained his admission that he stole the stereo units (See A. 265). Also prior to appellant's departure with the agents, arrest warrants based upon appellant's statements were obtained for Mancini, Greco, Rosario and Papernik.* The agents and appellant were unsuccessful in locating the goods that day. The night of April 21, 1975 appellant was lodged at Hackensack jail. The next day, April 22, appellant and the agents once again searched for the goods. This time they were successful in locating Papernik's house. However, only 20 of the 166 cartons were recovered from the red truck. Since it was late in the day when the recovery was made appellant signed a similar waiver of his right to a speedy arraignment in which he again admitted stealing the goods (See A. 266).

B. The Defense Case

The defense case was somewhat unusual, not so much in its substance, but in the manner in which it was presented. Because of an apparent seething conflict between counsel and appellant, there were two separate defenses. Counsel had been content that the defense of his client would best turn on resolution of the foreign nature of the shipment and, hence, the jurisdictional issue. Indeed, for the first half of the trial, the defense honed true to this line. Nevertheless, at the conclusion of the Government's case, it became apparent that appellant — against the express advice of counsel — wanted also to defend on the merits (A. 188).

Testifying in his own behalf, appellant admitted taking the Fried truck on March 5 (A. 194). He further ad-

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* The complaints against all four had to be dismissed when appellant refused to testify in the Grand Jury.

mitted that he was not employed by the Fried Trading Company at the time of the theft. He testified that he took the truck because of a family dispute which resulted in his being deprived of his rightful share of the profits as a part-owner. Appellant stated that at the time of his arrest the agents confused him by telling him that he was going to go to jail and that he had a prior record (A. 199).

Appellant testified that he sold the entire shipment to Louis Mancini for $23,000 and kept the entire amount for himself (A. 205). He also stated that the Assistant United States Attorney (Richard Appleby) promised him immunity at the time of his arrest (A. 208). The only reason he spent two days in jail prior to his arraignment was because hotel accommodations could not be found for him (A. 209).

The defense also called appellant's brothers, Zigmund and Nachman Brach. Zigmund Brach testified that appellant was still a partner in the company at the time of theft since he was still a member of the family (A. 212) and received monies from time to time for his living needs (A. 215). Nachman Brach testified that although appellant did not have shares in the corporation, "(e)verybody have a part" (A. 219).

ARGUMENT

POINT I

The jury could properly find that the stereo units were in foreign commerce at the time of the theft.

Appellant contends that he was entitled to a judgment of acquittal because the theft occurred when the goods were in a truck parked on a public street approximately 50 feet from their final destination. Appellant asserts that if the goods had not lost their character as a foreign shipment when they were picked up at the pier, they certainly had lost that character just prior to their final delivery.[9] Appellant's contention rests upon a curious reading of the cases, particularly this Court's decision in *United States* v. *Astolas*, 487 F.2d 275 (2d Cir. 1973), the leading case in the Circuit on this issue. Moreover, as we shall show, it rests upon the erroneous proposition that the jurisdictional requirement of Section 659 of Title 18 was somehow intended by Congress to give each criminal a sporting chance when determining at which point he should rob goods which had not yet reached its final destination. Thus, appellant has urged the unique proposition that every interstate or foreign shipment of goods loses its character as such a shipment at some point in time just prior to final delivery. As we will show, neither a reading of Section 659 nor any case yields such an artificial restriction on law enforcement authority in this area.

The first of appellant's arguments—"pickup constitutes delivery as a matter of law" (Br. p. 17)—is frivo-

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[9] Appellant made these same arguments to Judge Bartels in a fourteen page brief at the conclusion of the Government's case (A. 138). Judge Bartels rejected them in an opinion dictated into the record (A. 157-A. 161).

lous and appears to be nothing more than a device to give some impetus to appellant's second argument. *United States* v. *Astolas*, *supra*, which appellant makes no mention of in this point, makes it clear that unloading, and not pickup, constitutes delivery.[10] Under appellant's view of the law, federal law enforcement officers would have no authority to prosecute thefts which occur after goods have arrived in New York, the largest harbor in the United States, and just after pick-up by the consignee. Obviously, Congress did not intend such a result. Moreover, appellant's statement of the law would effectively eliminate that part of Section 659 which permits the jurisdictional requirement to be satisfied when a theft occurs after the goods have been delivered to any "platform".

Appellant makes a valiant but unavailing effort to overcome the *Astolas* decision to sustain his second argument—that delivery occurred at the time the truck was parked on a public street approximately fifty feet from the Fried Trading Company. In *Astolas* there were two outbound and one inbound tractor-trailers which had been stolen from a warehouse. The two outbound trailers were parked in an adjacent parking lot to the warehouse and

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[10] Appellant's reliance on the Fourth Circuit's *per curiam* decision in *United States* v. *Jones*, 446 F.2d 49 (4th Cir. 1971) for this proposition is spurious. The question of whether pick-up constitutes delivery as a matter of law was never before the court. Moreover, a shipment of personal luggage is far different from a shipment of merchandise between two commercial concerns. Delivery of commercial goods is complete, not upon arrival at an airport or seaport, but upon delivery of the merchandise to the commercial concern. Similarly, the question of whether pick-up constitutes delivery was never raised in *United States* v. *Gimelstob*, 475 F.2d 157, 164 (3d Cir. 1973), cited by appellant. In fact, that case, as well as *United States* v. *Yoppolo*, 435 F.2d 625 (6th Cir. 1970) also cited by appellant, supports the general rule that a foreign shipment does not lose its characteristic until it arrives at its final destination.

were ready to be delivered the next day to another state. The inbound tractor had arrived from out of state and had been backed into the loading platform of the warehouse, ready to be unloaded the following day.[11] This Court held that all three tractor-trailers were in interstate commerce. The plain holding of the case, as conceded by appellant, is that a foreign or interstate shipment continues "until the property arrives at its destination and is there delivered by actual unloading or being placed to be unloaded." *United States* v. *Astolas*, *supra*, at p. 278.

Appellant simply cannot overcome the plain fact that the car stereo units here had not been either unloaded or placed to be unloaded. We fail to see how appellant can claim that the car stereo units, which were in a truck on a public street and not even parked in front of the Fried Trading Company, were not in foreign commerce when this Court held in *Astolas* that goods which were in a truck backed right up to a loading platform were still in interstate commerce.[12] In *Astolas* the goods

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[11] Appellant states (Br. p. 23) that the inbound trailer had been parked outside the consignee's warehouse. Judge Henderson's charge, quoted in the Court's opinion at p. 278, clearly indicates that the trailer was parked at the loading dock.

[12] Appellant attempts to distinguish *Astolas* on the basis of a statement by Judge Medina that the goods on the inbound trailer "had been neither examined nor accepted" (p. 282) for his assertion that delivery had not yet occurred. There is nothing in the decision that suggests that the question of delivery turned on this factor. Moreover, Judge Bartels found on the basis of the evidence, and which is corroborated by appellant's admissions, that the theft took place immediately after the truck driver left the Fried truck on the public street. Accordingly, the two cartons could not possibly have been examined or accepted before the theft. In fact, there was no testimony that an examination or inspection ever was conducted. Finally, *O'Kelly* v. *United States*, 116 F.2d 966 (8th Cir. 1941), cited by appellant, is hardly support

[Footnote continues on following page]

had literally come to rest; the transit aspect of the shipment had terminated. Accordingly, this Court held that, although the goods had not been *moving* in interstate commerce, they still *constituted* an interstate shipment. Here, the goods were not only moving as a foreign shipment but also constituted a foreign shipment since the goods had not been placed in a position to be unloaded. In fact, as Israel Follman testified, since the only instruction he had been given by his employer was to back the truck to the loading platform, the stereo units could very well have been driven immediately from the public street to a customer rather than being unloaded at the platform (51, 53).[13]

Confronted with controlling adverse case law, appellant urges that appellant should be acquitted on the basis of "principles of Federalism". Appellant casually puts to the side the many decisions of this Court which have held that Section 659 is to be given a broad interpretation with respect to the scope of federal jurisdiction. As this Court stated in *United States* v. *Astolas*, *supra*, at p. 279:

> "Although the legislative history of the statute sheds no light on its purpose, this Court has repeatedly held, given the all-inclusive sweep of its terminology that Section 659 is designed by the

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for the proposition that the two cartons that Follman removed from the Fried truck for the purpose of examination constituted a "partial unloading". In *O'Kelly*, prior to the theft, the consignee had removed 100 of the total load of 600 sacks of sugar, had broken the seal to the truck and placed its own padlock on the truck.

[13] Contrary to appellant's assertion (Br. p. 17), the goods were still subject to encumberance by Customs since the Customs Public Store Appraiser had retained a carton of stereo units for customs duty evaluation (A. 42). See *United States* v. *Concepcion*, 419 F.2d 1263, 1264 (2d Cir. 1970) (Goods still in foreign commerce since, as a matter of law, the goods remained in customs' custody).

> Congress to promote the flow of goods in interstate commerce, *United States* v. *Berger*, 338 F.2d 485 (2d Cir. 1964), *cert. denied*, 380 U.S. 923, 85 S. Ct. 925, 13 L. Ed. 2nd 809 (1965); United States v. Thomas, 396 F.2d 310 (2d Cir. 1968), and that the carrying out of this purpose is not to be hampered by technical legal conceptions. 388 F.2d, supra, at 487."

Appellant's claim that his conviction is precedent for air, bus and train travelers to claim federal protection for robberies that occur after they have picked up their luggage at travel terminals is nothing more than a straw man argument. As shown above (see footnote 10 *infra* at p. 10), private persons can claim no such protection.

POINT II

Judge Bartels' charge on the foreign commerce element was proper. The judge properly prevented counsel from misstating the law in his summation.

A. Judge Bartels' charge on the foreign commerce issue

Appellant contends that Judge Bartels directed a partial verdict upon the issue of whether the goods were in foreign commerce. This contention is without merit.

Judge Bartels' charge on the element of foreign commerce is set forth at pages A. 233-A. 235 of appellant's appendix. The charge clearly informed the jury that the element of foreign commerce was a fact issue which they had to resolve. The judge stated ". . . there still remains a question whether in actuality a real delivery was made of this foreign shipment to Fried's place of business before the shipment was stolen" (A. 233a). The judge further charged:

> "If you find beyond a reasonable doubt that the cartons were shipped from Yokohama, Japan, were

> picked up at the pier by one of Fried's drivers, and that Fried's truck was then driven to its place of business where the truck stopped in front of or 50 feet from the Fried's place of business on Clymer Street, which is a public street; and that the shipment was stolen immediately after the driver left the truck for the purpose of delivering two cartons to Fried, then you may find that this shipment remained in foreign commerce at the time of the theft.
>
> On the other hand, if you find that at the time the truck stopped at Clymer Street near Fried's place of business, that in actuality the Fried Trading Company had complete possession, dominion and control over the truck and the cartons, then you may find that the shipment was no longer in foreign commerce at the time of the theft" (A. 274).

After hearing the charge we fail to see how appellant can possibly claim that the jury would have thought that the foreign commerce element was not an issue of fact. Appellant certainly cannot claim that Judge Bartels committed error in marshalling the evidence on the foreign commerce element because this Court approved this procedure in *Astolas*. Moreover, the last paragraph of the charge quoted above gave appellant a benefit to which he was not entitled under the law. See *United States* v. *Astolas*, *supra*. Further, while Judge Bartels would have been quite proper in charging the jury that the removal of two cartons by the truck driver for the purpose of examination did not constitute an "unloading" as a matter of law, he did not do so, and the jury could very well have acquitted on the basis that when the two cartons were removed from the Fried truck, the Fried Trucking Company acquired "complete possession, dominion and control over the truck and the cartons." We submit that Judge Bartels' charge on the foreign commerce in

this case was more beneficial to appellant than Judge Henderson's charge, approved of in *Astolas*. (See also Judge Bartels' supplemental charge at A. 257-A. 259).

B. Counsel's summation

Appellant also contends that Judge Bartels improperly restricted counsel's summation on the issue of foreign commerce. Specifically, appellant argues that he should have been permitted to argue to the jury that pick-up at the Brooklyn pier by the truck driver constituted delivery by calling the jury's attention to the fact that pick-up was made in a Fried truck, that Customs had released the goods and partial unloading had occurred at the Fried Trading Company. We submit that all that Judge Bartels did was to prevent counsel from misstating the law to the jury.

In denying appellant's motion for a judgment of acquittal, Judge Bartels ruled that pick-up of the stereo units at the Brooklyn pier by the truck driver Follman did not constitute delivery as a matter of law. We have argued (Point I) that this ruling was proper. As the colloquy between Judge Bartels and counsel indicates (See i.e., A. 166-167), counsel would have attempted to flout the judge's ruling and argue to the jury that pick-up at the pier did constitute delivery. Quite properly the judge would not permit this. See *United States* v. *Sawyer*, 443 F.2d 712, 713-714 (D.C. Cir. 1971); cf. *United States* v. *Cotter*, 60 F.2d 689, 692 (2d Cir. 1932).

Since the facts on the jurisdictional issue were wholly undisputed, the only question was what legal inference flowed from these facts. As the record shows, Judge Bartels simply would not permit counsel to call the jury's attention to irrelevant facts in order to allow the jury to draw an impermissible legal conclusion. Furthermore, as we have already shown Judge Bartels was quite cor-

rect in marshalling the relevant facts on the foreign commerce issue. To have permitted counsel to argue to the jury that such irrelevant facts (on the issue of foreign commerce) as pick-up at the pier in a Fried truck and release of the goods by Customs amounted to delivery would have contradicted the judge's own charge and led the jury down an erroneous path.[14]

POINT III

The trial judge properly denied appellant's motion to suppress his oral and written admissions.

Prior to trial appellant moved to suppress his oral and written post-arrest admissions on the sole ground that he believed he had been granted immunity from prosecution by Government agents prior to the making of the statements. The trial judge held a hearing on this issue and denied the motion (GA 103-104). Appellant claims that there is no basis in the record for the finding. We submit that not only was there a basis but there was overwhelming evidence to support this finding.

Appellant was the only witness who testified on behalf of the defense. He stated that at the outset of his interview with the Assistant United States Attorney and the customs agents, the Assistant promised him immunity from prosecution if he could help the Government locate the stolen goods (GA 77).[15] Asked to explain on

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[14] For the same reasons stated herein Judge Bartels was correct in denying appellant's second request to charge (see A. 8). This charge would have been a direct contradiction of the charge that the judge did in fact give and improper under the holding of *Astolas*.

[15] Appellant admitted that he had been given his *Miranda* rights by the agents (GA 73-74).

cross-examination how he could have believed he had been granted immunity when he spent two nights in jail prior to his arraignment,[16] appellant testified that the only reason he spent those nights in jail was because the Government could not find suitable hotel accommodations. Despite the fact that he admitted having frequent contact with the courts as a result of his numerous convictions and arrests, appellant testified that he did not pay attention to what was contained in the waivers of speedy arraignment which he signed and which contained his admissions that he stole the goods (GA 81; Government's Exhibits 10 and 11 at A. 265, A. 266). Appellant further testified that at a later conference he asked the Assistant United States Attorney in the presence of his then court-appointed lawyer, Joseph Lombardo,[17] for the Government to honor its earlier promise of immunity.

The Assistant United States Attorney and Gerald O'Neill, Special Agent with the United States Customs Service, testified at the hearing that no offers or promises of immunity were made to appellant at any time (GA 14,100). Joseph Lombardo testified that he could not recall appellant ever complaining to him about the Government's breach of a promise of immunity and that such a complaint would be something he would be likely to recall (GA 94-99).

At the conclusion of the hearing Judge Bartels credited the testimony of the Assistant United States Attorney, Gerald O'Neill and Joseph Lombardo and did not credit appellant's testimony. The motion to suppress

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[16] It will be recalled that appellant waived his right to a speedy arraignment on two consecutive days prior to arraignment.

[17] On September 31, 1975, Judge Bartels relieved Joseph Lombardo as appellant's court-appointed lawyer when appellant refused to sign an affidavit of indigency. Shortly thereafter, appellant's present attorneys entered a notice of appearance.

was accordingly denied, the judge stating that there had been "no problems of immunity in order to obtain Mr. Brach's cooperation" (GA 103-104). We are simply at a loss to see how appellant can claim here that there was no basis for this finding.[18]

Appellant's tagalong contention that the court committed plain error in failing to instruct the jury that in the event it found that the statements were involuntarily made the jury could disregard them in reaching its verdict is also meritless. Appellant took the stand at trial and admitted making the admissions as testified to by Agent O'Neill (A. 194). He never contended either before trial or at trial that the statements had been coerced or involuntarily made. His only claim was that the Government had granted him immunity. Agent O'Neill denied such a promise of immunity. The issue was strictly one of credibility. Thus, the trial judge presented this issue to the jury as one of credibility and marshalled the evidence on this issue. Since the issue of voluntariness had never been raised and since there was no evidence in the record to support such a claim,[19] the judge's presentation of the issue to the jury in this manner was altogether proper. Appellant never requested a charge on voluntariness nor objected to the trial judge's failure to so charge. Finally, in all the cases cited by appellant the

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[18] Appellant's claim that he does not understand English is ridiculous. His testimony at the hearing and at trial reveals he reads English (A. 193-A210). Appellant admitted on the stand he speaks English (A. 207). When counsel tried to raise this point at the hearing, Judge Bartels stated: "Well, he's . . . as a matter of fact, he speaks and understands very well. He was before me a couple of times" (GA 72).

[19] Agent O'Neill testified, and appellant never disputed, that he had been properly given his *Miranda* rights on three separate occasions prior to his post-arrest statements.

contention was that the defendant had been coerced into making a confession.[20]

POINT IV

Judge Bartels did not err in admitting evidence that, after obtaining a warrant for appellant's arrest, agents searched for him at race tracks and OTB parlors.

Appellant contends that it was reversible error for Judge Bartels to have permitted Agent O'Neill to testify that after obtaining a warrant for appellant's arrest he searched for him at race tracks and OTB parlors. The contention is without merit.

In order to prove flight, Agent O'Neill testified that from March 6, 1975, when he obtained an arrest warrant for appellant's arrest, until April 21, 1975, the date of the arrest, he and other customs agents searched for appellant an average of three days a week. During this period, and after it was learned appellant had not re-

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[20] Appellant makes no claim, nor could he, that the statutory mandate of 18 U.S.C. § 3501(a)(1) that the judge "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances" applies to the instant case. As *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975) makes clear that statute only applies when defendant makes a claim that his confession wos coerced. *United States* v. *Barry*, supra, 518 F.2d at 347 ("In short, Congress's unmistakable intent to provide adequate protection against the use of coerced confessions clearly included a desire that the jury play a part in weighing the evidence of duress.") *Cf. United States* v. *Lucchetti*, — F.2d —, (2d Cir. slip op. 2351; decided March 4, 1976). On facts strongly analogous to this case, this Court in *United States* v. *Nussen*, — F.2d —, (2d Cir. slip op. 1669, 1680; decided January 30, 1976) held that "there is not in the record of this case a single bit of evidence to justify a charge of coercion and nothing to show or even imply that the admissions he made were involuntary."

turned to his residence, a nationwide alarm was put out for appellant. Agent O'Neill testified that he searched for appellant at Aqueduct Race Track and OTB parlors (A. 89).[21]

We do not believe that this snippet of Agent O'Neill's testimony amounted to an implication that appellant was an inveterate gambler. In any case, after counsel objected, Judge Bartels quickly defused the impact of the testimony when he stated in the presence of this jury:

> The Court: It does not mean that the defendant frequented those places. It simply means that he was there, that is, the investigator, not Brach (A. 89).

Finally, in view of appellant's admission on the stand that he had been convicted twice for felonies involving thefts of goods, the prejudicial effect of this testimony was miniscule.

POINT V

It was not reversible error for Judge Bartels to permit Agent O'Neill to testify that he obtained arrest warrants for the recipients of the stolen goods.

Appellant contends that it was reversible error for Judge Bartels to permit Agent O'Neill to testify that he obtained arrest warrants for the individuals to whom appellant sold the stolen goods and who appellant implicated in his post-arrest statements.[22] Appellant asserts

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[21] Judge Bartels declined to charge the jury on flight. However, appellant never requested a charge to the effect that the jury should disregard this testimony.

[22] Judge Bartels denied apellant's motion to strike this testimony (A. 163-A. 164).

that the issuance of the warrants implied wrongdoing on the part of the recipients of the goods, which the jury could have used inferentially to corroborate the fact that defendant had in fact stolen the goods. This claim is without merit.

In his post-arrest statement, as testified to by Agent O'Neill appellant implicated the four individuals to whom he sold the stereo units. Although disclaiming that he had stolen the goods, appellant also admitted on the stand that he sold the stereos to Mancini (A. 204). While Judge Bartels may have been correct in his comment (in the presence of the jury) that the fact that arrest warrants were issued for these individuals was "not particularly relevant" (A. 108-A. 109), the introduction of this testimony was harmless.

There was overwhelming evidence that the goods in fact had been stolen by appellant.[23] First, there were appellant's admissions that he was not employed by Fried Trading Company at the time of the theft (A. 203); that he took the goods because he was mad at his brothers (A. 204); that he sold the goods to one Louis Mancini for less than one-half of the wholesale price and kept the entire amount for himself—despite the fact that he only claimed to be a part-owner of the Fried Trading Company (A 205); that there were no documents to indicate that the sale to Mancini at 963 Kent Avenue was part of a legitimate business transaction. Second, there was the testimony of the eyewitnesses who observed appellant in the very act of stealing the goods by driving the Fried truck in reverse down a one-way street and who observed him surreptitiously unloading and transferring the goods at the "drop point" at 963 Kent Avenue. Fin-

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[23] For the reasons stated below, appellant's claim that the Government failed to establish a *prima facie* case on the element of the stolen nature of the goods is also without merit. See Point IX, Appellant's Brief.

ally, there were the post-arrest admissions as testified to by Agent O'Neill and the two documents signed by appellant admitting that he had stolen the goods. Viewed in the context of this evidence, the testimony concerning the arrest warrants, if prejudicial, was harmless beyond any doubt.

POINT VI

The government had a right to cross-examine appellant concerning his two prior felony convictions.

Appellant claims that Judge Bartels abused his discretion in permitting the Government to cross-examine him concerning two prior felony convictions. The first conviction resulted from a jury verdict in 1972 for the sale and possession of a stolen foreign shipment of stereo units, for which appellant was sentenced to three years in imprisonment. This Court affirmed the conviction, *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). The second conviction resulted from a plea of guilty to one count of an indictment charging appellant with bringing a stolen motor vehicle into New Jersey. Appellant contends that under Rule 609(a)(1), Federal Rules of Evidence, the prejudicial effect of these convictions outweighed the probative value and ought to have been excluded. We submit that evidence of both convictions was probative and relevant on the question of appellant's credibility and that Judge Bartels was well within his discretion in admitting this evidence. See Rule 609(a)(1). We also believe that the convictions were admissible pursuant to Rule 609(a)(2) because the convictions involved dishonesty and that therefore no determination that the probative value of the convictions outweighed the prejudicial effect was necessary. We believe that appellant was more than adequately protected when Judge Bartels declined in the exercise of his discretion to permit evidence of these convictions during the Government's direct case.

At the outset of the trial the Government sought to introduce the felony convictions as prior similar acts in its direct case. Judge Bartels declined to allow the Government to introduce this evidence on the ground that it was not necessary in view of the strength of the Government's case (A. 12-A. 13).[24] Nevertheless Judge Bartels clearly indicated that his ruling could change depending on the way the trial developed (A. 12-A. 13). Since the initial strategy was to limit the defense to an attack on the foreign commerce element, the Government did not later seek to introduce evidence of the felony convictions in its direct case. It was only when appellant decided to defend on the merits by claiming on the witness stand that he owned the goods that Judge Bartels permitted the Government to impeach him on the prior felony convictions. Indeed, when counsel announced to the court the intention of appellant to testify (against counsel's wishes) Judge Bartels gave warning to appellant that the Government then had the right to introduce evidence of the prior convictions (A. 187).

We submit that the two felony convictions described above clearly involved "dishonesty" under Rule 609(a)(2) and were admissible on this basis. See *United States* v. *Puco*, 453 F.2d 539, 543 (2d Cir. 1973) ("We also have indicated that crimes which involve fraud or stealing 'reflect on honesty and integrity and thereby on credibility.'"); *United States* v. *Di Lorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). Accordingly, Judge Bartels had no obligation to balance the probative value of the convictions against the prejudicial impact. As the Committee Report on Rule 609 states:

> "The admission of prior convictions involving dishonesty and false statement is not within the dis-

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[24] It is clear that under the similar acts doctrine in this Circuit evidence of the underlying acts of these crimes would have been admissible and relevant and had Judge Bartels admitted the evidence he would not have abused his discretion.

> cretion of the Court. Such convictions are peculiarly probative of credibility and under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement".

We also believe that the convictions were admissible under 609(a)(1). Appellant testified that he owned the stereo units which he took from the Fried truck. This testimony was in direct conflict with that of Agent O'Neill who testified that appellant admitted having stolen the goods. It was also in conflict with his signed confessions. Therefore, the convictions were highly probative on the crucial question of credibility. See *United States* v. *Palumbo*, 401 F.2d 270, 274 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).

United States v. *Puco*, *supra*, cited by appellant, is not in point. There this Court reversed because the Government impeached the defendant based upon a 21 year old narcotics conviction. The holding was not that the Government may not impeach a defendant based upon a conviction for a crime identical or similar to the crime for which a defendant is on trial. Rather, the court held that a narcotics conviction is not "particularly relevant to in-court veracity" (at p. 542), especially when the conviction is of ancient vintage. The Court specifically distinguished narcotics convictions from crimes which involve dealing, which "reflect on honesty and integrity and thereby on credibility" at p. 543. We recognize that evidence of appellant's prior conviction in the Eastern District for a crime charged under the same statute for which he was on trial probably had a devastating effect upon the jury. Nevertheless, appellant's predicament was

caused by his own doing and not by the trial judge or the Government.[25]

POINT VII

Appellant was not denied his Sixth Amendment right to summon witnesses in his behalf by the refusal of Judge Bartels to permit his wife to testify.

Appellant contends that Judge Bartels improperly denied him his Sixth Amendment right to summon witnesses in his behalf by refusing to allow his wife to testify. The context in which appellant called his wife and the offer of proof with respect to her testimony shows this contention to be without merit.

It will be recalled that after the Government rested appellant took command of his own case against the wishes of his attorney. The record makes it clear that counsel strongly recommended that she not take the stand (A. 187-A. 192). Moreover, when asked by Judge Bartels as to what her testimony would be, counsel was hard-pressed to make a cogent offer of proof. He stated:

> "Mr. Youtt: She is going to testify that Simon Brach still—either still has or up until a point a couple of weeks ago still retained possession of keys to the truck and also apparently some sort of license that indicates that he had authority to drive the truck in question. That is all I know at this point because I really haven't prepared this witness. And haven't really discussed it with her" A. 191).

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[25] Judge Bartels properly charged the jury that the convictions "are to be considered only with request to one issue and one issue alone. That is the credibility of Simon Brach, as to whether you believe him or not" (A. 253). In his summation the Assistant United States Attorney also properly limited the use of the convictions to attacking appellant's credibility (253).

The fact that appellant possessed keys to the stolen truck would have been both irrelevant and cumulative—cumulative because Agent O'Neill had previously testified that appellant, in his post-arrest statement, stated that he possessed keys to the Fried truck—and irrelevant because the issue was not whether appellant had authority to drive a Fried truck but whether he had authority to appropriate unto himself the stereo units.

POINT VIII

The district court was not required to grant appellant a continuance until his § 2255 petition attacking his 1972 conviction had been decided by the district court.

Appellant claims that the failure of the district court to decide prior to trial his § 2255 petition attacking his earlier 1972 conviction prejudiced him because, so the argument goes, if the petition had been granted the Government would not have used the conviction for impeachment purposes. In order to understand the frivolousness of this contention, some background is necessary.

On March 3, 1972 appellant and his mother were convicted, following a jury trial, of one count of unlawful possession of goods stolen from a foreign shipment (Count 2), and one count of unlawful sale of such goods (Count 3). He was sentenced to three years' imprisonment on the possession count and a subsequent four-year period of probation on the sale count. On July 25, 1972, after appeals taken by both appellant and his mother, the judgment of conviction was affirmed. *United States* v. *Fried* (Fried I), 464 F.2d 983 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

Appellant's mother, Zali Fried, in addition to joining with him on the direct appeal from the conviction, moved by herself in 1972, and again in 1974, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The first motion was denied by the district court but reversed by this Court to the extent that it denied the motion for a new trial on the "sale" count (Count 3) and in all other respects affirmed the order, *United States* v. *Fried* [Fried II], 480 F.2d 201, *cert. denied*, 416 U.S. 983 (1974). The second motion was denied in an oral opinion of the district court. No appeal was taken from this decision. Appellant never joined in either of the Rule 33 motions.

Appellant was indicted here on May 16, 1975. On May 27, 1975 Judge Bartels set the case down for trial for October 14, 1975, which was later adjourned one week to October 21, 1975. On July 3, 1975 appellant filed his papers attacking the 1972 conviction, labelling them a § 2255 petition, apparently because the time limitation of Rule 33 had expired.[26] On September 19, 1975 Judge Bartels issued an order to show cause to the Government and responsive papers were filed on October 20, 1975, one day prior to trial. On October 9, 1975 counsel for appellant wrote a letter to the judge seeking a continuance of the trial on the grounds that the § 2255 petition should be decided prior to trial and on the ground that counsel had a conflicting trial commitment. At no time during the course of the trial, either at the commencement of the trial or at the time appellant took the stand, did counsel even mention the pendency of the § 2255 petition.

Continuances are within the sound discretion of the trial judge. Based on the foregoing we submit that Judge

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[26] Appellant's present counsel filed the § 2255 petition at the time appellant was still represented by his court-appointed lawyer, Joseph Lombardo.

Bartels could well have been suspicious as to the *bona fides* of the § 2255 petition and was therefore well within his discretion in denying the continuance. To permit a defendant, such as appellant, to delay his trial by the simple expedient of filing just prior to trial a § 2255 petition attacking a previous conviction would create havoc in the orderly scheduling of criminal cases.[27]

Appellant's contention also lacks any legal foundation. Rule 609(e) ("Impeachment by Evidence of Conviction of Crime") provides:

> "(e) Pendency of appeal—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."

Surely in the case of the pendency of a collateral attack there is even less reason than in the case of a direct attack not to allow the Government to offer evidence of the underlying conviction.

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[27] On March 9, 1975 Judge Bartels denied appellant's § 2255 petition in a memorandum decision. The court denied the petition because of its untimeliness and on the merits. The court stated: "Both Brach and his mother had their day in court where full and fair consideration was given to Brach's constitutional claims, and he cannot now seek relief where he has deliberately by-passed the orderly federal procedures provided at or before trial and by way of appeal." (Memorandum Decision, dated March 9, 1976, GA 108-118).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 15, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

believe that there is any argument that

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 15th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Harry E. Youtt, Esq.
919 Third Avenue
New York, N.Y. 10022

Evelyn Cohen

Sworn to before me this
15th day of March, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

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